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No. _____

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IN THE
SUPREME COURT OF THE UNITED STATES

GENE KIMMERLY SMITH (a trust);
Petitioner.

v.

OREGON DEPARTMENT OF REVENUE;
Janie 98037, Renee Sibley, Matthew Claflin,
Jolene FE3, John and/or Jane Doe, Revenue Agents, etc.
in their official and personal capacities;
Respondents.

ON PETITION OF A WRIT OF CERTIORARI TO
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Gene K. Smith, TTEE
GENE KIMMERLY SMITH (a trust)
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(541) 839-4970

QUESTIONS PRESENTED

1. Did the appeals court err by dismissing the case without ruling on the separate and distinct issue regarding the state's refusal to except payment made in full in U.S. gold coin in contradiction to the Constitution of the United States of America Article I § 10?
2. Did the appeals court err by dismissing the case without ruling on the separate and distinct issue (related to question 1 above) regarding the state's demanding payment in something other than U.S. gold coin in contradiction to the Constitution of the United States of America Article I § 10?
3. Did the appeals court err by dismissing the case without ruling on the question of whether or not the state can lawfully demand payment after said payment was already made in full in accord with law?
4. Does the appeals court's dismissal of Petitioner's case without ruling on the Article 1 § 10 constitutional violations noted above also deny Petitioner of the 1st Amendment secured right "*to petition the Government for a redress of grievances*" and violate the 7th Amendment right to have the case heard in trial?
5. Does the appeals court's dismissal of Petitioner's case without ruling on the Article 1 § 10 constitutional violations noted above, effectively authorize the state to deprive Petitioner of property without due process of law thus further violating Petitioner's 5th and 14th amendment secured rights to not be deprived of property without due process of law.
6. Did the appeals court err by ruling Petitioner is not an instrumentality of the United States Government, the nature of which instrumentality has not been previously ruled on in United States Courts?
7. Did the appeals court err by dismissing the case for lack of jurisdiction based on the Tax Injunction Act (hereinafter "TIA") when:
   a. the case presented no challenge to any tax law;

b. the case does not interfere with the state's lawful collection of taxes;
c. the state's action clearly violates Article 1 § 10 of the Constitution of the United States of America, which forbids the state from making or demanding payment in anything but gold or silver coin.
d. the state is clearly violating the state's Enabling Act's restrictions from granting the state any authority to violate said Constitution;
e. the state is clearly violating the state's own statutes, which declare a payment tendered is a payment made (Oregon Revised Statutes (ORS) 73.0603);
f. the Petitioner is an agency and/or instrumentality of the United States Government;
g. the United States Government has a proprietary interest?

8. Did the appeals court err by ruling Petitioner has "adequate remedy in state courts", when in fact no such remedy exists for several of the causes of action?
9. Did the appeals court err by ruling Petitioner has "adequate remedy in state courts", when in fact no such remedy exists for a federal agency such as Petitioner, which cannot so sue in state court?
10. Does the appeals court's dismissal of Petitioner's case without ruling on the state's deprivation of Petitioner's character by publishing Distraint Warrants and Writs of Execution without following due process of law violate Petitioner's 5th and 14th amendment secured rights to not be so deprived of property without due process of law with or without U.S.C. 42 § 1983.
11. Did the appeals court err by dismissing the case without ruling on the issue that Defendants' motion does not meet the standard for review for the court to grant a summary dismissal?

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IN THE SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner, GENE KIMMERLY SMITH (a trust), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit below.

OPINIONS BELOW

The opinion of the United States 9th Circuit Court of Appeals (Memorandum) appears at Appendix A and is not for publication. The order denying the petition for rehearing appears at Appendix B.

JURISDICTION

The date on which the United States Court of Appeals decided this case was August 4, 2005. A timely petition for rehearing was denied by United States Court of Appeals on October 18, 2005. The basis for federal jurisdiction in the court of first instance is: the constitutional questions as well as Title 28 §§ 1343(a)(3), 1331 and U.S.C. 42 § 1983.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED.

In pertinent part, the Constitution of the United States of America, Article I § 10, reads: "*No state shall...make any Thing but gold and silver coin a Tender in payment of debts*". The court erred by granting Respondents' Motion to dismiss without considering constitutional questions; which are:

1. Can the State of Oregon refuse to except payment made in full in U.S. gold coin in violation of the Constitution of the United States of America Article I § 10?
2. In relation to that question, can the State of Oregon demand payment in something other than U.S. gold or silver coin without violating said Article I § 10?

The appeals court's dismissal of Petitioner's case, without addressing said Article 1 § 10 questions, denies Petitioner of the 1st Amendment secured right "*to petition the Government for a redress of grievances*"; and,

The appeals court's dismissal of Petitioner's case, without addressing said Article 1 § 10 questions, denies Petitioner of the 7th Amendment secured right to have the case heard in trial?

The appeals court's dismissal of Petitioner's case, without addressing said Article 1 § 10 questions, in effect authorizes the state to ignore the United States Constitution, The United States Enabling Act for Oregon, their own Constitution and statutes and the due process of law accordingly required thus violating Petitioner's 5th and 14th amendment secured rights to not be deprived of property without due process of law?

The appeals court's dismissal of Petitioner's case without ruling on the state's deprivation of Petitioner's character by publishing Distraint Warrants and Writs of Execution without following due process of law violates Petitioner's 5th and 14th amendment secured rights to not be so deprived of property without due process of law.

The appeals court's dismissal of Petitioner's case without ruling on said Oregon's Constitution Article 1 § 10 (which reads in pertinent part, "*and every man shall have remedy by due course of law for injury done him in his person, property, or reputation*") violates Petitioner's secured rights to not be deprived of property without due process of law as per the last paragraph.

STATUTORY PROVISIONS INVOLVED.

The appeals court dismissed the case alleging a Tax Injunction Act (TIA), Title 28 U.S.C. § 1341, bar against federal court jurisdiction even though the TIA does not apply or bar jurisdiction when:

a. the case makes no challenge to any tax law;
b. the remedy requested in the case has no affect on the state's lawful collection of taxes;

c. the state is clearly violating the state's own statutes, which show that when a payment is tendered in full but refused said payment is considered lawfully made (Oregon Revised Statutes (ORS) 73.0603);
d. the state is clearly violating the state's Enabling Act's restrictions from granting the state any authority to violate the Constitution of the United States of America Article 1 § 10, which requires the state to make and demand payments only in gold or silver coin;
e. the Petitioner is an agency and/or instrumentality of the U.S. Government (Title 28 U.S.C. § 451);
f. the U.S. Government has in fact a proprietary interest in the case (see *U.S. v. Arlington County, Com. of Va.*, 326 F.2d 929).

In relation to paragraph e. above, Title 28 U.S.C. § 451 places jurisdiction beyond the ability of the state courts because Petitioner is an agency of the U.S. Government, which contradicts the trial court's dismissal and the appeals court's rule.

The state's deprivation of Petitioner's character by publishing Distraint Warrants and Writs of Execution without following due process of law violates Petitioner's 5th and 14th amendment secured rights to not be so deprived of property without due process of law and U.S.C. 42 § 1983 provides remedy in the federal courts for such deprivation, which remedy was denied Petitioner by the trial court and by the appeals court's rule.

STATEMENT OF THE CASE

Annually, in accord with law, Petitioner properly and timely filed all state and federal tax forms for tax year 1999 through 2002. Oregon Department of Revenue (hereinafter, "ODOR") sent Petitioner letters with incorrect names and addresses alleging Petitioner should file personal income tax forms, which allegation if followed would require Petitioner to violate the federal and state tax codes. Said letters were incomprehensible as delivered, wherefore, in accord with

ODOR's administrative review, Petitioner refused said ODOR letters and forms and returned the same to ODOR with an attached cover letter showing the causes for said refusal and requesting corrections if ODOR believed their cause was legitimate. ODOR failed to respond or otherwise correct their incomprehensible letters and/or forms in accord with law; rather ODOR began to speciously threaten collection actions.

To mitigate penalties and damages from occurring under ODOR's specious threat Petitioner went to ODOR headquarters in Salem, Oregon and paid the total amount of alleged debt owed for the tax years in question to ODOR's Cashier by tendering said payment in full to said Cashier in United States gold coins, at face value. ODOR refused to accept said gold coins alleging they could only receive funds in terms of Federal Reserve Notes. Thereafter, ODOR issued what they alleged to be "distraint warrants" and "writs of execution" against Petitioner's property.

The state's publication of said warrants and writs without following due process of law damaged Petitioner's reputation and rights. Accordingly, Petitioner (a Federal person and agency as described in the Complaint) filed a Complaint in District Court to compel ODOR to follow the law, account for said tender of payment and remedy the damages and deprivation of rights noted in the Complaint. Said Complaint was filed against ODOR and certain ODOR officials for unlawfully creating a warrant & alleged writ under color of state law and for filing an unlawful lien in Douglas County Clerk's Office against Petitioner's property after Petitioner had already paid all alleged taxes. Petitioner filed a Motion for Preliminary Injunction for relief from ODOR's spurious warrants and writs of execution. Respondents filed a Motion to Dismiss under F.R.C.P. 12(b) incorrectly alleging the court lacked subject matter jurisdiction as follows:

1) Plaintiff's claims are barred by the TIA;

2) Plaintiff fails to state a claim because the state is not a person under 42 U.S.C. 1983.

Respondents' motion failed to address the other issues like the issues related to ODOR refusing Petitioner's tender of payments, Petitioner's factual nature as an agency and instrumentality of the United States Government, which were plead in Petitioner's Complaint and pleadings; which issues also established federal court jurisdiction.

Petitioner filed a Motion to deny Respondents' Motion to dismiss based on the fact that Respondents' motion does not meet the standard for review for the court to grant a summary dismissal.

Based on the TIA the trial court granted Respondents' motion for summary judgment alleging there was recourse available in Oregon's Tax Court and so dismissed the case for lack of jurisdiction.

The trial court failed to take note or address either the issue of Petitioner's agency relationship with the U.S. Government or the issues related to the state's refusal of Petitioner's payment and their demand for payment contrary to constitutional limitations against the state.

Petitioner filed for a writ of error coram nobis in the nature of a FRCP Rule 60(b) motion to reconsider; however, the court did not respond to said motion to reconsider; therefore, Petitioner filed an appeal to the 9th Circuit Court of Appeals.

The appeals court upheld the trial court's ruling and provided a Memorandum alleging, "The district court properly held that the TIA bars this action because appellant not an instrumentality of the United States government". In actuality the trial court did not address Petitioner's nature as a United States Government agency or instrumentality, though petitioners nature as such was properly presented before the court — thus the appellate court's Memorandum (Appendix A) either incorrectly related the trial courts dismissal order or recognized that the trial court failed to address the issue of Petitioner's nature as an agent and/or instrumentality of the U.S. Government and then upheld the District Court's dismissal after reviewing that nature and the case 'de novo'. However, the appeals court review of that

nature was made totally off point — the cases the appeals court's used in said Memorandum to support their opinion have no relation either to Petitioner's nature or to the type of agency Petitioner is. Therefore, their review failed to examine the Material Facts of the case either as they are presented or in the light most favorable to Petitioner. Therefore, without Petitioner having a chance to prove said facts, the appeals court dismissed the case with no relevant of what it presented.

The appeals court Memorandum also incorrectly alleged, *"The district court properly held that ... appellant has adequate remedies available in the state courts"*; however, no such remedy exists.

Wherefore, Petitioner filed its Petition with the United States Supreme Court.

REASONS FOR GRANTING THE PETITION

In consideration of the fact that the trial court must hear a case in the light most favorable to plaintiff and the fact that Petitioner can prove its case if given the opportunity to do so, the question remains, "Did the district court and the appeals court err by dismissing the case without trial?" To understand the answer we must go to the basis for the courts' errant rulings, which basis is removed by understanding Petitioner's nature. Therefore, prior to showing 'Why the Appeals Court Erred' and 'Arguments for the Writ' we present the following uncontested material facts (collected from Petitioner's pleadings) as they relate to Petitioner's nature as an agency or instrumentality of the United States Government:

Uncontested Material Facts:

Petitioner's creation and nature as an agency or instrumentality of the United States Government:

1. The Social Security Administration (SSA) was created in accord with the Social Security Act of 1935 (SSAct), which states:

"AN ACT to provide for the general welfare...; to establish

a Social Security Board; to raise revenue; and for other purposes."

a. Accordingly SSA creates relationships.
b. *In anticipation of such relationships with the United* States Government (USG) it spent a considerable sum to create millions of blank Social Security Cards. Each Social Security Card (SSC) has a space on its face for: a name, a Social Security Number (SSN) and a signature.
c. SSA states they create this name and number combination "to uniquely distinguish the person so identified from any other person of a same or similar name."

2. Accordingly, on application, SSA created Petitioner; which creation contained the following elements defining Petitioner's nature and existence:

a. The Creator: on application, the SSA created Petitioner by:
   1) naming Petitioner;
   2) assigning Petitioner a Social Security number (SSN);
   3) registering a database entry uniquely reserving said name and SSN in SSA's system records;
   4) printing said name and SSN on a blank SSC; and,
   5) delivering said SSC (res in trust) to Petitioner.
b. The Trustee: SSA offered said SSC to the applicant instructing applicant that:
   1) said SSC belongs to the USG and is to be held (in trust) by Petitioner until such time as its owner may require its return;
   2) if SSA's offer is accepted said SSC must be signed to activate the card and to verify Petitioner's signature;
   3) said card may be used to verify the unique name, SSN and signature of Petitioner thus verifying

Petitioner's authority to use said name and SSN in commerce and industry.

Thus, by accepting said SSC, the applicant agrees to lend its consciousness and physical capacity to Petitioner in its Trustee capacity.

c. The Beneficiary: in accord with SSAct, et seq. (Federal Insurance Contributions Act (FICA), etc.) Petitioner must make specific distributions to the USG (Beneficiary).

d. The "corpus": or thing (res) initially placed in trust by SSA was said SSC:

1) Said SSC was presented with the instruction, *"This card is invalid if not signed by the number holder ... Improper use of this card and/or number by the number holder or any other person is punishable by fines, imprisonment or both. This card is the property of the Social Security Administration and must be returned upon request."*

Therefore, said SSC is to be held in trust until such time as its owner may require its return.

2) SSA's reservation of ownership of said SSC presupposes value;

3) SSA's requirement of due diligent care over said SSC until such time as it can be returned to its actual owner presupposes value;

4) Assets and resources thereafter generated by Petitioner and so held in trust for its beneficiary can (and have) increase the holdings of Petitioner for its Beneficiary.

3. By definition a trust is created any time a thing of value is held by one person for the interest and benefit of another person. A trust is defined by several elements, which are:

a. a Creator, one who intentionally creates a trust;

b. a Trustee, one who has the sole control of a trust;

c. a Beneficiary, the equitable owner (actual owner) of that which is held in trust;

d. a thing of value is held in trust for the trust's Beneficiary.

4. Petitioner has maintained and operated itself as an individual separate from any other person or capacity.

5. Petitioner transacts all of its relations in accord with its creation;

6. Petitioner was created without a formal written indenture; therefore, Petitioner exemplified its creation with a formal written Indenture and:

a. In accord with U.S.C. 5 § 552a, Petitioner submitted the same to its Creator by amendment for SSA's administrative review of said Indenture's legal, lawful and correct nature;
b. SSA accepted the same without contest; and,
c. SSA so admitted said Indenture legally, lawfully and accurately relates Petitioner's creation and operation;

7. The person that lends its consciousness and physical capacity to Petitioner's Trustee capacity has corporate immunity from Petitioner and has no relationship to, or benefit from, Petitioner other than the contractually secured performance necessary to carry out Petitioner's operations in accord with its creation. Petitioner **only:**

a. generates funds for its Beneficiary (USG) by its relations in commerce and industry;
b. holds funds and or assets in trust for USG;
c. distributes funds (regularly) to its Beneficiary in accord with United States Code; and,
d. disburses funds to pay for its necessary operating expenses.

Wherefore, Petitioner, by definition, is an agent and or instrumentality of its Beneficiary the USG and has been from its creation.

Why the Appeals Court Erred:

1. Both the district court and the appeals court erred by failing to rule on the issue of demand payment

in gold coin, which constitutional issue (Article 1 § 10) in and of itself compels jurisdiction to the federal court.

The Supreme Court ruled: "*The acts of congress making the notes of the United States a legal tender do not apply to involuntary contributions exacted by a state*" (*Hagar v. Rec. Dist. #108*, 111 U.S. 701.). Therefore, by denying jurisdiction and dismissing Petitioner's case without upholding the Supreme Court rule, the district and appeals courts erred by departed from the law well established by the Constitution and rule of this court. Though Federal Reserve Notes (FRN), and other instruments representing the same, may constitute legal tender which can be voluntarily used by a taxpayer to satisfy a State's demand for payment, the Constitution at Article 1 § 10 forbids the state from making "*any Thing but gold or silver Coin a Tender in Payment of Debts*". Though this court has recognized that the states can request tax payments in other forms there is no provision in law that allows the state to refuse a tender of gold coin in payment of taxes or any other debt. Though Congress has also authorized FRNs as "legal tender" that authorization has not changed nor has this court overruled its rule as follows, "The term "lawful money" of the United States shall be construed to mean gold and silver coin" (*Knox v. Lee and Parker v. Davis*, 79 U.S. 457).

2. The Appeals' Court erred by overlooking, or failing to take note of, the fact that Petitioner is an agency and/or instrumentality of the USG, as shown by the following:

The material facts relative to the nature of Petitioner were shown above in **Uncontested Material Facts** pg. 6 and in the Complaint and/or case pleadings.

The following sub paragraphs show a few of the many laws and prior court rulings etc., which support proper recognition of Petitioner's USG agency and instrumentality nature:

a. Whereas all assets held by Petitioner are held in trust for the USG, the USG has proprietary interest in

Petitioner and in all actions brought against Petitioner's assets [see 28 USC § 451].

b. By furnishing its employer with an IRS Form W-4, Petitioner instructed its employer to withhold funds in accord with FICA and to distribute the same to the Petitioner's Beneficiary.
c. Under Section 3661, I.R.C.1939 such funds withheld in accord with FICA, from the time they were generated by the Petitioner until the time the employer delivers the same to the USG, constitute a "fund in trust for the United States." Cf. *Hercules Service Parts Corp. v. United States*, 202 F.2d 938 (26 USC § 7501, *Slodov v. United States*, 436 U.S. 238).
d. Wherefore, Petitioner's Beneficiary has statutory authority to directly prosecute third party business relations for failure to timely distribute funds provided to them by Petitioner for Beneficiary distribution in accord with the terms of Petitioner's creation as imposed by 26 USC § 7202, *Slodov v. United States*, 436 U.S. 238 (and from the 1939 Title 26 USC § 2707, *Bloom v. United States*, 272 F.2d 215); demonstrating the USG is the real party of interest with the power to sue for Petitioner's interest.
e. This agency capacity is well established in case law: *U.S. v. BALTIMORE & O.R. CO.*, 84 U.S. 322 (1872), *STONE v. WHITE*, 301 U.S. 532 (1937), *CHICAGO, R.I. & P. RY. CO. v. SCHENDEL*, 270 U.S. 611 (1926).

3. The appeals court erred by ruling Petitioner has plain and clear remedy in state court where no such remedy exists because a state court cannot rule on Petitioner's nature and a federal agency such as Petitioner cannot bring this case in state court.

Petitioner has no remedy in state court because a federal agency cannot bring this suit in state court. A federal agency must bring this suit in federal court. Petitioner has no remedy in state court because the state has no authority

to rule on Petitioner's nature as a trust or agency of USG, a key issue of the case. No provisions exist whereby a federal agency may bring such a case in state court. Further, the constitutional issues involved and Title 42 § 1983 mandate Federal jurisdiction.

4. The appeals court erred by ruling the TIA bars federal subject matter jurisdiction in this case for the following reasons:

a. The TIA does not bar federal jurisdiction when the plaintiff is a federal instrumentality in accord with the federal instrumentality doctrine. (*Dept. of Employment et al. v. United States et al.*, 385 U.S. 355 (1966), *United States of America and Phillips Petroleum v. Bureau of Revenue of State of New Mexico*, 291 F.2d 677 (1961), *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463 (1976)).

b. The TIA does not bar federal jurisdiction where the USG has a proprietary interest as shown at paragraph 1. above (*U.S. v. Arlington County, Com. Of Va*, 326 F.2d 929).

c. The TIA does not bar federal jurisdiction when Petitioner has no plain and clear remedy in state court as shown at paragraph 2 above.

d. The TIA only precludes the USG from interfering with the state taxing ability so long as the State's action is lawful; the Complaint shows ODOR's actions against Petitioner were unlawful.

e. The TIA does not bar federal jurisdiction in a case like Petitioner's because:

   1) the case does not ask the court to interfere with state's taxing authority;
   2) the case does not ask the court to interfere with the lawful operation of the state's taxing ability;
   3) the case does not challenge any state tax.

   The Complaint only challenges the nature of ODOR's unlawful failure to follow: the law (constitution, etc.), its tax code, lawful policies and procedures.

5. The appeals court's erred by dismissing Petitioner's case without ruling on the state's deprivation of Petitioner's character by publishing distraint warrants and writs of execution without following due process of law and thus failed to follow the Constitution's security of Petitioner's 5th and 14th amendment secured rights to not be so deprived of property without due process of law.

The state's damage of Petitioner's character and reputation by publishing distraint warrants and writs of execution in the county clerks office without following due process of law violates Petitioner's 5th and 14th amendment secured rights to not be so deprived of property without due process of law and U.S.C. 42 § 1983 provides remedy in the federal courts for such deprivation, which remedy was denied Petitioner by the trial court and by the appeals court's rule. The appeals court dismissed the case without hearing this matter because of its TIA based rule; however, the TIA does not bar jurisdiction to this case for the causes shown above: therefore, this error becomes apparent.

6. The appeals court erred by determining Petitioner is not an instrumentality of the USG citing a case about tax immunity, which issue has no relevance to Petitioner or to Petitioner's case.

In support of the Appeal's Courts ruling regarding USG instrumentality, the Appeals Court cited *United States v. New Mexico et al.*, 455 U.S. 720, 735; which case referenced several situations regarding tax immunity for private contractors to USG; however, Petitioner's case is not one regarding: immunity from taxation, private corporations acting under government contracts or any other similarity between the referenced cases and Petitioner. In other words, 455 U.S. 720, 735 has no bearing or relation to this instant case or to the type of USG agency applicable to Petitioner. As shown above at page 9, paragraph 1., Petitioner is an agency and instrumentality of the USG — that is to say an agency created by the USG for the sole purpose of generating and

holding assets for the USG. Title 28 U.S.C. § 451 properly defines Petitioner's agency nature where it provides in part: *"the term 'agency' includes any department, independent establishment, commission, administration, authority, board or bureau of the United States or any corporation in which the United States has a proprietary interest, unless the context shows that such term was intended to be used in a more limited sense."*

7. The appeals court erred by ruling in favor of Respondents' Motion to Dismiss when said motion failed to meet the standard of review required to grant a summary dismissal of Plaintiff's Complaint; namely:

a. As a matter of Law, Summary Judgment cannot be granted when the Material Facts of a case are in dispute unless jurisdiction cannot be established; however, in this case jurisdiction was clearly established (FRCP 56 (c), *Poller v. Columbia Broadcasting*, 368 U.S. 464). Especially when considering a Summary Judgment Motion, a plaintiff's case must be heard in the light most favorable to plaintiff (*Cruz v. Beto*, 405 U.S. 319,322 (1972); *Barron v. Reich*, 13 F.3d 1370, 1374 (9th Cir. 1994). The trial court dismissed the case, ruling that the TIA applied because Petitioner had adequate remedy in state court. The Appeals court incorrectly ruled jurisdiction was not established due to TIA because Petitioner was not an instrumentality of USG and Petitioner had adequate remedy in state court.

1) The trial court followed the pattern of Respondents' Motion by using male gender specific pronouns to refer to Plaintiff even though such usage is incomprehensible when used to refer to Petitioner (a trust).
2) Petitioner's nature is an elemental Material Fact of Petitioner's case, which fact was never contested by Respondent and was never considered by the trial court, nor was it reasonably considered

by the appeals court in their alleged "trial de novo" review of the case. None-the-less, Petitioner can prove its nature and presented sufficient facts and argument to both the district court and the appeals court, which facts are compiled and represented to this instant court starting on page 6 above.

3) Respondents' and the district court's use of male gender specific pronouns to refer to Petitioner proves the facts of this case are clearly in dispute, Therefore, Petitioner should have been given the opportunity to prove the same in a trial of the facts.

b. The trial court and appeals court both ignored Petitioner's payment in full in U.S. gold coin to ODOR's cashier (facts easily established by affidavits and witnesses at trial) in violation of Article 1 § 10 of the U.S. Constitution. This constitutional violation in itself warrants Federal court jurisdiction. Wherefore, Petitioner should have been given the opportunity to prove the same in a trial of the facts.

c. The district court and appeals court both ignored ODOR's violation of Oregon's Enabling Act requiring Oregon to comply with the U.S. Constitution, which constitutional issues can only be settled in Federal court. Petitioner should have been given the opportunity to prove the same in a trial of the facts.

d. The trial court and appeals court both ignored Petitioner's payment in full in U.S. gold coin to ODOR's cashier (facts easily established by affidavits and witnesses at trial) in violation of Oregon Revised Statutes 73.0603 declaring a payment tendered to be a payment made. Wherefore Petitioner should have been given the opportunity to prove the same in a trial of the facts.

e. The district and appeals courts' dismissal of Petitioner's case without ruling on Oregon's Constitution

Article 1 § 10 (which reads in pertinent part, "and every man shall have remedy by due course of law for injury done him in his person, property, or reputation") violation violates Petitioner's secured rights to not be deprived of property without due process of law. Petitioner can easily prove the facts of ODOR's property rights violations. Wherefore, Petitioner should have been allowed to prove the facts of the case at trial.

f. ODOR's first distraint warrant was issued against a 3rd party's property, not Petitioner's, and said 3rd party, a man Gene K. Smith, filed an *in rem* case against ODOR's distraint warrant in state district court in order that said warrant be proven lawful. Without even a hearing or any proof that said warrant was lawful, the court removed the case to the Tax Court. The Tax Court assumed that the "Taxpayer" was the 3rd party plaintiff, rather than the Petitioner in this case, and ruled, "**He** could have timely appealed from that notice to the Magistrate Division..." "Once taxpayer pays the amounts asserted to be due, voluntarily or otherwise, **he** may proceed under ORS 305.280(3) to raise substantive or procedural challenges to the actions of the department" (Bolded emphasis added). The state's requirement to pay the amounts allegedly owed by a party to secure the right for having an issue heard forces the party to admit a non existent violation thus jeopardizing their case in order to have the opportunity to have the case heard. Such a forced jeopardy is a violation of the due process clauses of the constitutions of both the U.S. and state. To compel a 3rd party who is wrongly named on a warrant with a requirement to pay a tax allegedly owed by some other person in order to challenge the unlawful nature of the warrant or the unlawful taxing process also violates due process of law. ODOR provided no opportunity for Administrative Review

hearings, which were requested, in violation of Petitioner's due process rights. The state district court provided no opportunity for hearing the matter, and the Tax Court provided no opportunity or hearing to even consider the person named on the warrant was not the taxpayer. It is therefore clear that Oregon provides no "plain, speedy or efficient remedy" in its courts to resolve this matter. Further, certainty that a remedy exists is an important factor in establishing a state court remedy is "plain." A state remedy is not "plain" within the meaning of the TIA if there is uncertainty regarding its availability or effect (*Ashton v. Cory*, C.A. 9 (Cal.), 780 F. 2d 816 (1986)). Wherefore, the courts erred in ruling that Petitioner had adequate recourse in the state court.

8. The Appeals Court erred by ruling, "Appellant's remaining contentions are unpersuasive", which is a short way of saying the appeals court ignored the other causes of action, which causes separately established federal court jurisdiction as follows:

a. Petitioner provided the court evidence in support of Petitioner's Complaint, which showed that Petitioner tendered payment in full of all obligations alleged and demanded by the state; however, the state refused to accept payment, thus making it impossible for Petitioner to comply with the state's allegation of a debt; which refusal also violated at least the U. S. Constitution Article 1 Section 10.

1) Whereas Petitioner timely tendered payment in full in U.S. gold coin, at face value, to ODOR; and,
2) Whereas ODOR refused to accept said payment (in violation of the U.S. Constitution Article 1 § 10);
3) Therefore, ODOR made it impossible for Petitioner to make payment; and,

4) In accord with Oregon Revised Statutes 73.0603 (based upon ancient Maxims of Law) reads:
"Tender of payment. *(1) If tender of payment of an obligation to pay an instrument is made to a person entitled to enforce the instrument, the effect of tender is governed by principles of law applicable to tender of payment under a simple contract. (2) If tender of payment of an obligation to pay an instrument is made to a person entitled to enforce the instrument and the tender is refused, there is discharge, to the extent of the amount of the tender, of the obligation of an endorser or accommodation party having a right of recourse with respect to the obligation to which the tender relates. (3) If tender of payment of an amount due on an instrument is made to a person entitled to enforce the instrument, the obligation of the obligor to pay interest after the due date on the amount tendered is discharged. If presentment is required with respect to an instrument and the obligor is able and ready to pay on the due date at every place of payment stated in the instrument, the obligor is deemed to have made tender of payment on the due date to the person entitled to enforce the instrument. [1993 c.545 §69]"*
   a) Accordingly, by Oregon statute ODOR discharged the alleged obligation to pay and "deemed Petitioner to have made payment in full";
   b) However, ODOR continues to threaten collection actions and alleges the payment has not been made.
   c) Petitioner asked the trial court for a preliminary injunction against Respondents' unlawful collection actions until the case regarding the same could be heard, but the trial court denied the motion, which issue

was within the jurisdiction of the court. Wherefore, the courts erred in dismissing the case without trial.

b. Petitioner tendered payment in full in U.S. gold coin at face value and ODOR refused to accept the same (in violation of the U.S. Constitution Article 1 § 10). Wherefore, the courts erred in dismissing the case without ruling on this constitutional issue.

c. The Constitution Art. 1 § 10 requires, 'no state shall make (or demand) any Thing but gold or silver Coin a Tender in Payment of Debts'; which limitation does not limit voluntary participation in the Federal Reserve Note system, or in the related bankruptcies of the USG et al.; however, such voluntary participation does not eliminate the fact that the payment was lawfully tendered to the ODOR in full at face value in U.S. gold coins; which payment was refused. Both the trial court and the appeals court have the capacity to rule on this issue. Wherefore, the courts erred in dismissing the case without ruling on this constitutional issue.

d. ODOR's violation of the U.S. Constitution Art. 1 § 10, the propriety of lawfully tendering payment in U.S. gold coin and the ability of the state to forbid payment in any other form of instrument other than Federal Reserve Notes all rest within the jurisdictional ability of the federal courts, both the trial court and the Appeals Court have the capacity to rule on such matters, which were properly presented before the court and remain persuasive. Wherefore, the courts erred in dismissing the case without ruling on this constitutional issue.

e. The trial court and appeals court both ignored ODOR's violation of Oregon's Enabling Act requiring Oregon to comply with the U.S. Constitution's 5th and 14th Amendment secured rights to not be deprived of property (reputation) without due process of law, which constitutional issue can only be settled in Fed-

eral court. Petitioner should have been given the opportunity to prove the same in a trial of the facts.

Arguments for the Writ:

1. The Ninth Circuit Court erred by dismissing the case, which dismissal sanctioned a departure by a lower court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power. The circuit court, by failing to overrule the trial court's dismissal without ruling on the issues of demand payment in gold coin by a state (which issue has previously been decided by this Court) has sanctioned a serious departure from the accepted and usual course of judicial proceedings in its ruling: viz. the Constitutional issues of whether a state can:

i) refuse a tender of payment in United States gold coin;
ii) demand payment in something other than United States gold and/or silver coin, when such a tender of payment has already been made.

When the Constitution plainly states, *"No State shall...make any Thing but gold and silver Coin a Tender in Payment of Debts;"* United States Constitution, Article I § 10:

a. the state courts have no authority to rule on the issue;
b. the federal court has jurisdiction to rule on the issue but both the trial court and the appeals court erred by dismissing the case without responding to the issue;
c. this Court has only limitedly ruled on this issue in cases like, *Hagar v. Reclamation District 108*, supra);
d. both the trial court and the circuit court failed to rule on this issue;
e. therefore, this court must exercise its supervisory powers and rule on such departure by a lower from the accepted and usual course of judicial proceedings to secure a just response to Petitioner's Complaint.

2. The Ninth Circuit Court erred by incorrectly decided an important question of federal law that has not been, but should be, settled by this Court: viz. whether Petitioner is an agency or instrumentality of USG. The Ninth Circuit

Court's rule was off point, was made contrary to the facts of this case and contrary to the agreements Petitioner has been bound by since its creation.

a. The state courts have no authority to rule on the issue;
b. and the Ninth Circuit Court's rule ignores Petitioner's creation by the SSA (in accord with the Social Security Act of 1935, et seq.) thus ignoring the fact that Petitioner is a trust holding assets of, and acting for, the USG;
c. therefore, this instant court must rule in order to settle this very important issue of federal law as to Petitioner's nature as it was created thus allowing the trial court to hear the entirety of Petitioner's Complaint.

3. The Ninth Circuit Court erred by dismissing the case without deciding the important question of federal law as shown above in Argument 1, which denies Petitioner of several rights secured by the Constitution, not the least of which are, the 1st Amendment secured right "*to petition the Government for a redress of grievances*", the 7th Amendment right to have the case heard in trial; which dismissal in effect authorizes Respondent to deprive Petitioner of property without due process of law thus further violating Petitioner's rights as secured under the 5th and/or 14th amendments and removes Petitioner right to expect the USG to enforce Article 1 § 10 of the Constitution of the United States of America's limited control over the states. When the state violates its own laws, its Enabling Act's provisions and the provisions of the United States Constitution:

a. the federal court has the debt of justice and jurisdiction to rule on the issue but both the trial court and the appeals court erred by dismissing the case without responding to said issues;
b. therefore, this court must rule on these issues in order to settle these very important matters of constitutional law and to secure a just response to Petitioner's Complaint in accord with said Constitutions.

4. The Ninth Circuit Court erred by dismissing the case without deciding an important question of federal law that has apparently not been, but should be, settled by this Court: viz. whether the TIA limits the federal court from jurisdiction when:

n. there is no challenge to any tax law;
a. there is no affect on the state's lawful collection of taxes;
b. the only challenge is to the state's unlawful acts;
c. the state is clearly violating the state's own statute that requires that when a payment is lawfully tendered by the obligee and refused by the obligor, it must be considered as a payment made, or,
d. when the state has no authority to violate the U.S. Constitution's Article 1 § 10, or,
e. when Petitioner is an agency or instrumentality of the United States Government, or,
f. when the United States Government has in fact a proprietary interest in the case?

5. The Ninth Circuit Court erred by dismissing the case, without deciding an important question of federal law that has apparently not been, but should be, settled by this Court: viz. the state's deprivation of Petitioner's character by publishing distraint warrants and writs of execution without following due process of law violates Petitioner's 5th and 14th amendment secured rights to not be so deprived of property without due process of law with or without U.S.C. 42 § 1983.

6. The Ninth Circuit Court erred by dismissing the case, which dismissal sanctioned such departure by a lower from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power. The appeals court's failure to overrule the trial court's dismissal, without ruling on the issues of Respondent's dispositive motion, fails to meet the standards for review for summary dismissal (which issue has previously been decided as shown in paragraph 7 pg. 14) has sanctioned a serious departure from the accepted and usual course of

judicial proceedings in its ruling. This Court must exercise its supervisory powers and rule on the actions of the appeals court to secure a just response to Petitioner's Complaint

CONCLUSIONS

Wherefore, the petition for a writ of certiorari should be granted at the debt of justice for the causes shown.

Respectfully submitted,

GENE KIMMERLY SMITH (a trust)
c/o P.O. Box 30
Canyonville, Oregon 97417
(541) 839-4970

FILED
AUG 04 2005
CATHY A. CATTERSON,
CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GENE KIMMERLY SMITH (Trust),
Plaintiff - Appellant,

No. 04-35901
D.C. No. CV-0 4-06213-MRH

v.

MEMORANDUM

OREGON DEPARTMENT
OF REVENUE; et al.,
Defendants - Appellees.

Appeal from the United States District Court
for the District of Oregon

Michael R. Hogan, District Judge, Presiding
Submitted August 1, 2005

Before: O'SCANNLAIN, CALLAHAN, and BEA,
Circuit Judges.

The Clerk is directed to change the caption to reflect that Gene Kimmerly Smith (Trust) is the correct Plaintiff - Appellant.

This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

The panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

Gene Kimmerly Smith (Trust) appeals the district

court's order dismissing Petitioner's 42 U.S.C. § 1983 action against the Oregon Department of Revenue as barred by the Tax Injunction Act ("TIA"), 28 U.S.C. § 1341, and denying Petitioner's motion for a preliminary injunction. We have jurisdiction pursuant to28 U.S.C. § 1291. We review de novo a dismissal for lack of subject matter jurisdiction, see *Jerron West v. California State Bd. of Equalization*, 129 F.3d 1334, 1337 (9th Cir. 1997), and we affirm.

The district court properly held that the TIA bars this action because appellant is not an instrumentality of the United States government, see *United States v. New Mexico*, 455 U.S. 720, 735 (1982), and appellant has adequate remedies available in the state courts, see OR. REV. STAT. §§ 305.410 & 305.501. See 28 U.S.C. § 1341.

Appellant's remaining contentions are unpersuasive.
AFFIRMED.

FILED
OCT 18 2005
CATHY A. CATTERSON.
CLERK
U.S. COURT OF APPEALS

THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GENE KIMMERLY SMITH (Trust)
Plaintiff-Appellant

No. 04-35901
DC # cv-04-06213-MRH
Oregon (Eugene)

v .

OREGON DEPARTMENT
OF REVENUE; et al.,
Defendants-Appellees

Before: O'SCANNLAIN, CALLAHAN, and BEA,
Circuit Judges

ORDER

The petition for panel rehearing is denied.

No further filings will be accepted in this closed case.

(2)

Supreme Court, U.S.
FILED

051190 JAN 12 2006

OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

GENE KIMMERLY SMITH (a trust);
Petitioner.
v.

OREGON DEPARTMENT OF REVENUE;
Janie 98037, Renee Sibley, Matthew Claflin,
Jolene FE3, John and/or Jane Doe, Revenue Agents, etc.
in their official and personal capacities;
Respondents.

ON PETITION OF A WRIT OF CERTIORARI TO
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI SUPPLEMENTAL APPENDIX

Gene K. Smith, TTEE
GENE KIMMERLY SMITH (a trust)
c/o P.O. Box 30
Canyonville, Oregon 97417
(541) 839-4970

FILED' 04 SEPT 8

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

GENE KIMBERLY[1] SMITH (Trust)
Plaintiff,
v.
Civil No. 04-6213-HO
OREGON DEPARTMENT OF REVENUE"
et al.,
Defendant.

JUDGMENT

This action is dismissed.

Dated: September 8, 2004.
Donald M. Cinnamond, Clerk
by C. Pew, Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

GENE KIMMERLY SMITH (Trust),
Case No. O4-6213-HO
Plaintiff,
ORDER

OREGON DEPARTMENT OF REVENUE,
et al.,
Defendants.

The amended complaint alleges plaintiff is the, "Gene Kimmerly smith Trust", "borrows the consciousness

[1] Court's misspelling of name is duplicated.

necessary to fulfill its Trustee capacity from a man known as Gene K. smith (not a party to this case). and is an employable person with civil rights provided by the United States Constitution and laws passed by congress. Amend. Comp. at 2-5, ¶¶ 1, 4.c.i-ii, 9-10. The amended complaint further alleges defendants (1) unlawfully attempted to collect taxes which plaintiff does not owe, (2) denied plaintiff due process in connection with tax collection efforts, (3) illegally refused to accept payment in gold coins, and (4) deprived plaintiff of overpayments, all in violation of 42 U.S.C. S 1983. Amend. Comp. at 33-36. Plaintiff seeks declaratory and injunctive relief, and compensatory and punitive damages. Plaintiff filed a motion for preliminary injunction seeking relief from a distraint warrant and writ of execution issued by defendant Oregon Department. of Revenue (ODOR) and addressed to Gene Kim Smith. Defendants filed a motion to dismiss the case with prejudice on grounds that plaintiff's claims are barred by the Tax Injunction Act (TIA) , 28 U.S.C. S 1341, and ODOR is not a person within the meaning of 42 U.S.C. § 1983.

The TIA bars this court from enjoining or restraining assessment and collection of stale taxes where a plain, speedy and efficient remedy may be had in Oregon's courts. 20 U.S.C. § 1341. Oregon provides such a remedy through its procedures for challenging tax assessment and liability, including tax court. See e.g. Or. Rev. Stat. §§ 305.410, 305.501. Defendants point out that Gene K-smith unsuccessfully challenged the distraint warrant at issue in this case in the Oregon Tax Court. Smith vs. Department of Revenue, 2003 WL2584033, 17 Or. Tax. 135. There is no allegation that Gene K. Smith appealed the decision of the tax court to the Oregon Supreme Court. While plaintiff maintains it is distinct from Gene K. smith, it does not allege that it filed any complaint on its own behalf in tax court. State remedies are not demonstrably inadequate, and do not appear exhausted. The requested injunctive and declaratory

relief is therefore barred by the TIA (Franchise Tax Bd. of California v. Alcan Aluminum, Ltd., 493 U.S. 331, 338 (1990)). Actions for monetary damages under section 1983 for allegedly unlawful administration of a state tax system are barred by principles of comity, Fair Assessment in Real Estate Ass'n v. McNary, 454 U.S. 100, 115-116 (1981). This court can grant no effective relief, and the amended complaint fails to state a claim upon which relief can be granted.

Conclusion

For the foregoing reasons, plaintiff's motion for preliminary injunction [#4] is denied; defendants motion to dismiss [#5] is granted,' plaintiff's motion to deny defendant's motion to dismiss [#11] is denied. This action is dismissed.

IT TS SO ORDERED.

DATED this 6th day of September, 2004. .

Michael J. Hogan
United States District Judge